

45. The breadth of the term "class" may also affect how quickly the sunset provision contained in Section 273(d)(6) becomes effective. If classes are defined more narrowly, it may be easier for the Commission to make a determination that the requirements of Section 273(d)(3) should be terminated with respect to a specific class, but it would have many such determinations to make. Conversely, if the Commission defined "class" broadly, it would be more difficult for the Commission to make a determination that the requirements of Section 273(d)(3) should be terminated, but there would be a much smaller number of determinations needed.

46. We also seek comment on how to interpret the phrase "*during the previous 18 months*" in Section 273(d)(3)(A).⁸¹ One interpretation of the italicized phrase is that if, at the date on which an entity seeks to manufacture equipment, that entity is currently certifying equipment, or has within the previous 18 months certified equipment within a particular class, it may manufacture equipment within that class only through a separate affiliate. If an entity that certifies equipment seeks to manufacture equipment within a particular class of equipment and within the previous 18 months that entity has not certified equipment within that same class, it may manufacture equipment directly. A second possible interpretation of the phrase is that if the certification entity was certifying equipment and manufacturing equipment within the same class within 18 months prior to the effective date of the 1996 Act, the entity may continue to do so without creating a separate affiliate. We seek comment on the proper interpretation of this phrase.

47. Section 273(d)(3)(B) specifies particular separate affiliate requirements, such as the maintenance of separate books, records and accounts. The Commission has issued a separate NPRM addressing affiliate transactions that fall within the scope of that section.⁸² In addition to these accounting safeguards, however, Section 273(d)(3)(C) states that the certification entity, *inter alia*, shall "not discriminate in favor of its manufacturing affiliate in the establishment of standards, generic requirements, or product certification." Certain statutory provisions that predate the 1996 Act already impose nondiscrimination requirements on all common carriers. For example, Section 201 requires that all carrier "charges, practices, classifications, and regulations . . . shall be just and reasonable."⁸³ In addition, section 202 makes it unlawful for any common carrier "to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services," or "to make or give any unreasonable preference or advantage to any particular person, class of persons, or

⁸¹ 47 U.S.C. § 273(d)(3)(A) (emphasis supplied).

⁸² *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 11 FCC Rcd 9054, 9099-9102 (1996).

⁸³ 47 U.S.C. § 201(b).

locality."⁸⁴ Pursuant to these statutory provisions, the Commission established requirements for interconnection between local exchange carriers and interexchange telecommunications service providers,⁸⁵ and for interconnection between BOCs and ESPs.⁸⁶

48. We tentatively conclude that our existing nondiscrimination rules are inadequate in the context of Section 273(d)(3)(C) because these rules do not address the ability of a certification entity to discriminate in favor of its manufacturing affiliate. Unlike Section 202, which prohibits "unjust or unreasonable discrimination," Section 273(d)(3)(C) uses no adjectives to modify the meaning of the verb "discriminate." We seek comment, therefore, on whether Congress intended to impose a stricter standard for compliance with Section 273(d)(3)(C) by enacting a flat prohibition on all discrimination.⁸⁷ The verb, "to discriminate" means to "make a clear distinction" or to "act on the basis of prejudice."⁸⁸ We tentatively conclude, therefore, that Section 273(d)(3)(C) requires the certification entity to provide its services to its manufacturing affiliate on terms, conditions or rates that are at least as good as those it provides to unaffiliated manufacturers. We seek comment on this tentative conclusion, including comment on (1) any specific concerns that we should address in this proceeding; (2) the language of proposed rules, if any, that a party asserts we should adopt to address these dangers; and (3) the relationship, if any, between Section 273(d)(3)(C) and Section 272(c)(1), which prohibits a BOC from discriminating between an affiliate and any other entity in, *inter alia*, the establishment of standards. We tentatively conclude that the other prohibitions that are contained in Section 273(d)(3)(C)(ii-iii) are clear and that no clarification or additional rules appear to be necessary to implement this section.

⁸⁴ 47 U.S.C. § 202(a).

⁸⁵ See *MTS and WATS Market Structure*, Phase I, Third Report and Order, 93 F.C.C.2d 241 (1983), modified on reconsideration, 97 F.C.C.2d 682 (1983), modified on further recon., 97 F.C.C.2d 834 (1984), *aff'd in principal part and remanded in part sub. nom. National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095 (D.C.Cir. 1984), cert. denied, 469 U.S. 1227 (1985), modified on further reconsideration, 99 F.C.C.2d 708 (1984) and 101 F.C.C.2d 1222 (1985), *aff'd on further reconsideration*, 102 F.C.C.2d 849 (1985).

⁸⁶ *Amendment of Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, Phase I, 104 F.C.C.2d 958 (1986) ("*Phase I Order*") recon., 2 FCC Rcd 3035 (1987) ("*Phase I Reconsideration Order*"), further recon., 3 FCC Rcd 1135 (1988), second further recon., 4 FCC Rcd 5927 (1989); *Phase I Order* and *Phase I Reconsideration Order vacated California I*, 905 F.2d 1217; *Phase II Order*, 2 FCC Rcd 3072 (1987) (see note 32, *supra*, for the complete subsequent history of the *Phase II Order*).

⁸⁷ We sought comment on a similar issue in *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, CC Docket No. 96-149, Notice of Proposed Rulemaking, FCC 96-308, ¶ 72 (rel. July 18, 1996).

⁸⁸ *Webster's II New Riverside University Dictionary*, Riverside Publishing Co., at 385 (1994).

4. Section 273(d)(4): Manufacturing Limitations for Standards Setting Organizations

49. Section 273(d)(4) prescribes procedures that are intended to be open to all interested parties in the process for setting and establishing industry-wide standards and generic requirements for telecommunications equipment and CPE.⁸⁹ These procedures apply to standards-setting activities by "any entity that is not an accredited standards development organization and that establishes industry-wide standards for telecommunications equipment or customer premises equipment, or industry-wide generic network requirements for such equipment, or that certifies telecommunications equipment or customer premises equipment manufactured by an unaffiliated entity." Additionally, this section imposes requirements to assure fair, even-handed certification processes,⁹⁰ and prohibits anticompetitive behavior.⁹¹

50. Section 273(d)(4) potentially could encompass a wide range of entities or alliances of entities. Bellcore would appear to fall squarely within the ambit of Section 273(d)(4); we seek comment, however, on whether the sale of Bellcore to SAIC or another entity unaffiliated with the BOCs could affect the applicability of this section to Bellcore. We also seek comment on the potential additional scope of this section, including the extent to which it could apply to research, development, or adoption of standards, specifications, or generic requirements by large carriers, other entities, or alliances. In addition, we seek comment on these specific issues: (1) the ability of the RHCs, Bellcore or other carriers to circumvent the requirements of 273(d)(4) by designating standards or generic requirements as, for example, "internal," "non industry-wide," "optional," company-specific "specifications," etc.; (2) the appropriate definition, and treatment, of such *de facto* standards or requirements that may not be adopted through the 273(d)(4) processes, including the relationship between these standards and the definition of "industry-wide" standards contained in 273(d)(8)(C); and (3) the adequacy of 273(d)(5) and our recently-adopted default dispute resolution processes⁹² to address the anti-competitive harms that may result from the establishment of such standards or requirements. Furthermore, we seek comment on the appropriate treatment of standards developed or adopted by large entities or alliances (e.g., individual RHCs, GTE, or alliances) (a) in the event the entity or alliance were to control at least 30% of the deployed access lines in the United States, as defined in 273(d)(8)(C); and (b) in the event that the entity or alliance were to control fewer than 30% of such lines.

⁸⁹ 47 U.S.C. § 273(d)(4)(A).

⁹⁰ 47 U.S.C. § 273(d)(4)(B).

⁹¹ 47 U.S.C. § 273(d)(4)(C)-(D).

⁹² *Implementation of Section 273(d)(5) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996 -- Dispute Resolution Regarding Equipment Standards*, Report and Order, 11 FCC Rcd 12955 (1996).

51. Section 273(d)(4)(A) specifies procedures to be followed by any entity subject to Section 273(d)(4) in establishing and publishing any industry-wide standard, industry-wide generic requirement, or "substantial modification" thereto for telecommunications equipment or customer premises equipment. We seek comment on what should be deemed to constitute a "substantial modification." Specifically, we ask commenters to address whether the Commission should define "substantial modification" precisely or whether we should establish factors that should be considered in determining what constitutes a "substantial modification." With regard to factors to be considered, we request comment on what factors, such as impact on network reliability, performance, security, and interoperability, might be established to assess what constitutes a "substantial modification." Furthermore, we seek comment on the appropriate weight that should be given to each individual factor proposed.

52. Section 273(d)(4)(A) imposes five duties upon any entity, "that is not an accredited standards development organization" and that establishes an industry-wide standard or generic requirement. Section 273(d)(4)(A)(i) requires any such entity to "issue a public notice of its consideration of a proposed industry-wide standard or industry-wide generic requirement." The 1996 Act does not specify what constitutes adequate "public notice." We believe that to achieve its statutory purpose, the public notice must alert as many interested persons as possible of the standard or requirement activity, so that if they so desire, they may participate in the standard or requirement development process. We seek comment on the means of publication most likely to ensure broad knowledge of the impending activity. We note that Bellcore currently publishes information regarding changes to its generic requirements in its *Digest of Technical Information*. This digest is produced monthly and provided to subscribers for a fee.⁹³ In addition, Bellcore has provided periodic supplements to this digest that describe its requirement plans for the entire year. Entities such as the ATM Forum maintain pages on the World Wide Web that describe specifications development efforts. Additionally, when major changes to generic requirements occur, they are often discussed in Alliance for Telecommunications Industry Solutions (ATIS) industry forums.

53. We tentatively conclude that publications such as the Bellcore *Digest of Technical Information* and publications on the World Wide Web similar to that of the ATM Forum would constitute adequate public notice because these forms of notice are available to the public at reasonable expense, provide a summary of the proposed work, provide contact information, and set tentative dates for when the requirement or specification will be available. We seek comment on this tentative conclusion and on any additional factors that should be considered in determining generally what should constitute adequate "public notice." We also seek comments listing other publications or means of providing "public notice" that would meet the public notice requirement. To the extent that public notice can be provided by placing material on World Wide Web sites, we seek comment on whether and how the

⁹³ The annual subscription fee is \$110. Bellcore, *Digest of Technical Information*, Jan. 1996. We are concerned that fees for "publications" that satisfy this "public notice" requirement remain inexpensive.

public could reasonably be informed of the location of this information. For example, could standards entities provide public notice by submitting an announcement or hypertext link that would be placed on a page established for this purpose on the FCC's World Wide Web site, or on the World Wide Web site of an accredited standards development organization? We also seek comment on whether public notice could be provided by posting information through the Internet on relevant Usenet newsgroups, or on a new newsgroup established for this purpose. In addition, we seek comment as to whether public notice should be provided by electronic mail, either by sending information directly to interested parties or by posting information on relevant Internet "mailing lists." Finally, we seek comment on the role that the ATIS industry forums and TIA groups might play in ensuring interested parties have access to industry-wide generic requirement and standard development processes.

54. Section 273(d)(4)(A)(ii)-(v) states

"(ii) such entity shall issue a public invitation to interested parties to fund and participate in such efforts on a reasonable and nondiscriminatory basis, administered in such a manner as not to unreasonably exclude any interested industry party;

(iii) such entity shall publish a text for comment by such parties as have agreed to participate in the process pursuant to clause (ii), provide such parties a full opportunity to submit comments, and respond to comments from such parties;

(iv) such entity shall publish a final text of the industry-wide standard or industry-wide generic requirement, including the comments in their entirety, of any funding party which requests to have its comments so published; and

(v) such entity shall attempt, prior to publishing a text for comment, to agree with the funding parties as a group on a mutually satisfactory dispute resolution process which such parties shall utilize as their sole recourse in the event of a dispute on technical issues as to which there is disagreement between any funding party and the entity conducting such activities, except that if no dispute resolution process is agreed to by all parties, a funding party may utilize the dispute resolution procedures established pursuant to paragraph (5) of this subsection."

We have recently limited the definition of a "funding party" in the context of Section 273(d)(5)'s dispute resolution processes to include only parties that "provide actual funding to support the standards-setting process," specifically excluding parties that merely post a

"performance bond" or provide "in-kind" support.⁹⁴ We tentatively conclude that this definition should apply in the context of Section 273(d)(4)(A) as well, and that the remainder of the requirements imposed by Section 273(d)(4)(A)(ii)-(v) are self-explanatory. We request comment on these tentative conclusions.

55. Section 273(d)(4)(B) sets forth procedures that an entity must follow when it "engages in product certification for telecommunications equipment or customer premises equipment manufactured by unaffiliated entities." Such activity must be performed pursuant to "published" and "auditable" criteria, and must use "available industry-accepted testing methods and standards." We tentatively construe the phrase "auditable criteria" to mean criteria that, when applied in a certification process, are sufficiently precise that a neutral third party would be able to replicate each certification and determine whether each certification had, or had not, been performed in an unbiased manner. We request comment on the validity of this construction, and also request comment as to whether the "Generally Accepted Auditing Standards" that have been propounded by the American Institute of Certified Public Accountants are adequate for this purpose.⁹⁵ We seek comment on what should constitute publication and how we should determine if the criteria used to perform the product certification are auditable. In addition, we seek comment as to how the term "industry accepted testing methods" should be defined; whether such testing methods currently exist and, if so, what they are; and what constitutes "industry accepted." We also request comment as to how we should determine whether a testing method is "industry accepted." More narrowly, in this context, we seek comment on whether the term "industry" includes all telecommunications service providers, or those providers and all manufacturers, or subsets of these or additional categories. We request that commenters address whether any particular types of entities specifically should be included in, or excluded from, the term "industry?"

56. Section 273(d)(4)(C) prohibits any entity that is not an accredited standards development organization and that establishes industry-wide standards from undertaking "any actions to monopolize or attempt to monopolize the market for such services." We seek comment on how best to implement this provision. For example, should we identify specific acts that would constitute *per se* violations of Section 274(d)(4)(C)? If so, what should those acts be and what showings should be required to establish a *prima facie* violation of this provision? Or, should some other approach be used? Those advocating another approach should discuss why this approach would be more effective. Should specific penalties (for example, fines and forfeitures) be assessed for specific violations, and if so, in what amount or amounts?

⁹⁴ Implementation of Section 273(d)(5) of the Communications Act of 1934 as amended by Telecommunications Act of 1996 -- Dispute Resolution Regarding Equipment Standards, Report and Order, 11 FCC Rcd at 12969.

⁹⁵ See e.g., AICPA Codification of Statements on Auditing Standards, AU 320.32, 320.36, 320.37 (1996).

57. Section 273(d)(4)(D) states that any entity that is not an accredited standard development organization shall not "preferentially treat its own telecommunications equipment or customer premises equipment or that of its affiliate, over that of any other entity in establishing and publishing industry-wide standards or industry-wide generic requirements for, and in certification of telecommunications equipment and customer premises equipment." We seek comment on how best to implement this provision. How should the phrase "preferential treatment" be defined? In enforcing this provision of the 1996 Act, should we adopt rules that identify specific acts that would constitute "preferential treatment" and thereby constitute *per se* violations of Section 273(d)(4)(D), or should some other approach be used? Should we adopt rules that provide uniform fines and forfeitures for specific violations, and if so, what should the fines and forfeitures be, and what should constitute a *prima facie* case? We suggest that parties interested in commenting on these issues propose rules that they believe would most efficiently, and effectively, enforce these provisions of the 1996 Act. For example, one form of "preferential treatment" we can identify at this time would be preferential licensing of proprietary technology. We seek comment as to whether the Commission should require, as do the International Organization for Standardization ("ISO") and the American National Standard Institute ("ANSI"), that participants agree to license proprietary technology on "reasonable" terms before that technology is incorporated into an official standard. We request that commenters advocating such Commission action define terms that should be considered "reasonable," and that commenters opposing such Commission action discuss other possible approaches to this potential problem. In addition, we seek comment on whether we should use existing ANSI, ISO, or other rule structures as a model for developing Commission rules in this area, including specific comment on the features of existing rule structures that work well, and potential gaps that should be addressed.

58. Section 273(d)(5) requires that the Commission prescribe a dispute resolution process to be used if all parties cannot agree on a dispute resolution process when establishing and publishing any industry-wide standard or generic requirement. Because this Commission has already issued a Report and Order addressing Section 273(d)(5), that section will not be addressed further here.⁹⁶

5. Section 273(d)(6): Sunset

59. Section 273(d)(6) defines the circumstances under which the Commission must lift the manufacturing safeguards of Sections 273(d)(3) and the procedural safeguards of Section 273(d)(4), providing that:

The requirements of paragraphs (3) and (4) shall terminate for the particular relevant

⁹⁶ See *Implementation of Section 273(d)(5) of the Communications Act of 1934 as amended by Telecommunications Act of 1996 -- Dispute Resolution Regarding Equipment Standards*, Report and Order, 11 FCC Rcd 12955.

activity when the Commission determines that there are alternative sources of the industry-wide standards, industry-wide generic requirements or product certification for a particular class of telecommunications equipment or [CPE] available in the United States. Alternative sources shall be deemed to exist when such sources provide commercially viable alternatives that are providing services to customers. The Commission shall act on any application for such a determination within 90 days after receipt of such application, and shall receive public comment on such application.⁹⁷

We seek to identify those factors that the Commission should use in making the determination required by Section 273(d)(6). We tentatively conclude that factors that should be addressed include the number of entities developing standards, developing generic requirements or conducting certification work; the ability of these entities to compete with each other; and the length of time during which those entities have been conducting the relevant activity. We also seek comment as to what factual record the Commission should compile in making the determination required by Section 273(d)(6), including specific procurement documents or other information the Commission should require applicants to submit under this section. We ask that commenters addressing this issue provide specific comments on appropriate ways in which the Commission can balance its need to develop an adequate factual record on such applications against its statutory obligation to act within 90 days.

60. In addition, we seek comment on how we should define two phrases within Section 273(d)(6). The first, "class of telecommunications equipment or CPE," was examined in our earlier discussion of Section 273(d)(3). We request comment as to whether that analysis should apply to this phrase as used in Section 273(d)(6) and whether other considerations inherent in the implementation of Section 273(d)(6) should require a different interpretation or rule. The second phrase we seek to define is "commercially viable alternatives that are providing services to customers." The term "alternatives" in this phrase suggests that the number of entities conducting a relevant activity is a factor we should consider, and that a minimum of two entities must be conducting a relevant activity. We seek comment as to whether the existence of two entities conducting a relevant activity is both a necessary and sufficient condition for termination of the Section 273(d)(3) and (4) safeguards. In addition, it appears that, to assess the viability of entities, it is necessary to determine if the alternative entities are competitive and to examine the duration of their existences. We believe that such an analysis is necessary to ensure that we keep in place the manufacturing safeguards set by statute until they are no longer necessary. Finally, we seek comment on the relationship among (1) the phrase "commercially viable alternatives that are providing services to customers;" (2) the phrase "alternative sources of industry-wide standards, industry-wide generic requirements, or product certification;" and (3) the definition of the term "industry-wide" contained in Section 273(d)(8)(C).

⁹⁷ 47 U.S.C. § 273(d)(6).

61. While we do not want to lift statutory safeguards prematurely, we also would seek to eliminate them as promptly as possible once they are not needed. With this in mind, we tentatively conclude that the regulations developed to implement Section 273(d)(3) and (4) should not apply to certification pursuant to Part 15 (Radio Frequency Devices) or registration pursuant to Part 68 (Connection of Terminal Equipment to the Telephone Network) of the Commission's rules.⁹⁸ Through its equipment authorization programs, the Commission ensures compliance with Part 15 and Part 68 of its rules, ensuring against network harm when CPE is attached to the public switched network. The success of this program is underscored by the highly competitive nature of CPE in the United States that has given consumers broad choice in the type of terminal equipment they use in their homes and offices for many years. We note also that there are many commercially viable laboratories now in operation throughout the United States that test to Part 15 and Part 68 and that have done so for some time.⁹⁹ We seek comment on this tentative conclusion.

62. Section 273(d)(7) states that in administering Section 273(d), the Commission "shall have the same remedial authority as the Commission has in administering and enforcing the provisions of this title with respect to any common carrier subject to this Act." Finally, Section 273(d)(8) defines several terms used in Section 273(d). We tentatively conclude that the language of these paragraphs requires no further clarification at this time. We seek comment on this tentative conclusion.

E. Section 273(e): BOC Equipment Procurement and Sales

63. Section 273(e) governs BOC practices in procuring and selling telecommunications equipment. With the exception of Section 273(e)(4), the provisions of Section 273(e) apply on their face to all BOCs. Section 273(e), however, is contained within a statute that otherwise addresses BOC obligations in the manufacturing context. We seek comment therefore, on whether the requirements of Section 273(e) applies to all BOCs or only to BOCs that are authorized to manufacture under Section 273(a).

64. To prevent Bell Operating Companies from favoring entities with whom they have a telecommunications equipment manufacturing relationship, Section 273(e)(1) requires that "[i]n the procurement or awarding of supply contracts for telecommunications equipment, a Bell operating company, or any entity acting on its behalf, for the duration of the requirement for a separate subsidiary including manufacturing under this Act -- (A) shall consider such equipment, produced or supplied by unrelated persons; and (B) may not discriminate in favor of equipment produced or supplied by an affiliate or related person."

⁹⁸ 47 C.F.R. Parts 15 and 68.

⁹⁹ See, e.g., Equipment Authorization Division of the Federal Communications Commission, Contract Test Sites on File as of March 1, 1996 (Mar. 1996).

65. The Act provides no definition of the word "consider." As a consequence, we first look to the ordinary meaning of that word. "Consider" means to "think about seriously" or "bear in mind."¹⁰⁰ This definition suggests that Section 273(e)(1)(A) would be satisfied if a BOC merely opened its procurement and sales processes to entities other than itself or its affiliate(s). We request comment as to (1) whether this definition of "consider" is sufficient, or whether some other definition would be more consistent with the intent of Congress; and (2) any specific actions that a BOC must take in fulfilling this statutory obligation.

66. In contrast, Section 273(e)(1)(B) unequivocally prohibits BOCs from discriminating in favor of equipment produced or supplied by an affiliate or related person. Accordingly, the language of Section 273(e)(1)(B) seems to make it clear that the procurement decision may not rest solely on the BOC's relationship with the supplying entity and that, in addition to opening its procurement and sales processes, a BOC may need to take affirmative steps to ensure that it does not favor proposals from "affiliates or related persons" for reasons other than merit. Section 272(a)(2)(A) requires a BOC to engage in manufacturing only through a separate affiliate and Section 272(c)(1) provides that the BOC "may not discriminate between that . . . affiliate and any other entity in the provision or procurement of goods, services, facilities and information, or in the establishment of standards." With respect to this Section 272(c)(1) prohibition, we tentatively concluded that, "at minimum, that BOCs must treat all other entities in the same manner as they treat their affiliates, and must provide and procure goods, services, facilities and information to and from these other entities under the same terms, conditions, and rates."¹⁰¹ We seek comment on: (1) whether the word "discriminate" has any different import in the context of Section 273(e)(1)(B) than it does in Section 272(c)(1); (2) what specific actions or types of actions by or on behalf of a BOC would be considered discriminatory in this context; and (3) what affirmative steps, if any, a BOC would need to take to ensure that it does not discriminate, in violation of Section 273(e)(1)(B).

67. While the prohibition contained in Section 272(c)(1) applies to affiliates, the prohibition contained in Section 273(e)(1)(B) applies to "affiliates and related persons." This use of the term "related persons" suggests that the discrimination prohibition in Section 273(e)(1)(B) may apply to a larger class of entities than that contained in Section 272(c)(1) and corresponds with the use in Section 273(e)(1)(A) of the term "unrelated persons." We seek comment on the meaning of the terms "unrelated persons" and "related persons." These terms suggest that the BOCs not be permitted to discriminate in favor of parties with whom

¹⁰⁰ *Webster's II New Riverside University Dictionary*, Riverside Publishing Co., at 301 (1994).

¹⁰¹ *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, CC Docket No. 96-149, Notice of Proposed Rulemaking, FCC 96-308, ¶ 73 (rel. July 18, 1996).

they have some type of relationship.¹⁰² We seek comment as to specific types of relationships that would make an entity a "related person" for purposes of Section 273(e). For example, should a royalty agreement between a BOC and a manufacturer render that manufacturer a "related person?" We note that Section 273(d)(8)(A) defines "affiliate" as having the same meaning as in Section 3 except that, for purposes of Section 273(d)(1)(B) an "aggregate voting interest in [Bellcore] of at least 5 percent of its total voting equity, owned directly or indirectly by more than 1 otherwise unaffiliated [BOC], shall constitute an affiliate relationship." In contrast, no such specificity is provided with regard to the meaning of "related person." We request that commenters provide the language of any rules that they assert would be needed to ensure that a BOC does not discriminate in favor of either affiliates or related persons, in violation of Section 273(e)(1)(B).

68. Section 273(e)(2) requires that "[e]ach Bell operating company or any entity acting on its behalf shall make procurement decisions and award all supply contracts for equipment, services, and software on the basis of an objective assessment of price, quality, delivery, and other commercial factors." We seek comment on the scope of, and request appropriate definitions for, each of the terms "equipment," "services," and "software." For example, we seek comment on: (1) whether the scope of the term "equipment," in this context, should be limited to telecommunications equipment and CPE; (2) what types of services the mandate of Section 273(e)(2) encompasses; and (3) whether the requirements of Section 273(e)(2) apply to the procurement of all software, only the software "essential to [the] design and development of" telecommunications equipment or CPE,¹⁰³ or some other subset. We tentatively conclude that the remainder of this provision is self-explanatory and that no further elaboration of this requirement is necessary in our rules. We seek comment on this tentative conclusion and request that parties that disagree with this tentative conclusion propose the language for rules to address their concerns.

69. We recognize that traditional, complaint-based enforcement techniques may be inadequate for the effective enforcement of Sections 273(e)(1) and 273(e)(2). Even when confronted with clear violations of the strictures of these sections, a manufacturer may be reluctant to complain publicly because, in doing so, it might risk alienating one or more customers that represent a significant source of potential future sales. Accordingly, we request comment, including the text of proposed rules, on whether we need to develop additional enforcement mechanisms, such as mandatory auditing or reporting requirements, for use in enforcing Sections 273(e)(1) and 273(e)(2).

70. Section 273(e)(3) provides that "[a] Bell operating company shall, to the extent

¹⁰² *Webster's II New Riverside University Dictionary* at 992 (defining "related" as "connected" or "associated").

¹⁰³ *See United States v. Western Elec. Co.*, 675 F. Supp. at 667 n.54

consistent with the antitrust laws, engage in joint network planning and design with local exchange carriers operating in the same area of interest. No participant in such planning shall be allowed to delay the introduction of new technology or the deployment of facilities to provide telecommunications services, and agreement with such other carriers shall not be required as a prerequisite for such introduction or deployment."¹⁰⁴ We seek comment on the extent to which current antitrust laws allow joint network planning and design and on appropriate definitions of the terms "area of interest" and "network planning and design." We also request comment on the need for, and the proposed text of, any rules that the Commission should adopt (1) to facilitate permissible, or bar impermissible, joint network planning and design; and (2) otherwise to ensure that the requirements of Section 273(e)(3) are achieved.

71. The Commission recently issued a *Notice of Proposed Rulemaking* in CC Docket No. 96-237 to implement Section 259, entitled "Infrastructure Sharing."¹⁰⁵ Section 259 requires incumbent LECs¹⁰⁶ to make certain "public switched network infrastructure, technology, information, and telecommunications facilities and functions" available to defined "qualifying carriers" in the service areas where such qualifying carriers have requested and

¹⁰⁴ 47 U.S.C. § 273(e)(3).

¹⁰⁵ We will address issues relating to Section 259 in a separate proceeding. See *Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-237, Notice of Proposed Rulemaking, FCC 96-456 (rel. Nov. 22, 1996) ("*Infrastructure Sharing NPRM*"). Section 259(a) requires the Commission to prescribe implementing regulations within one year of the date of enactment of the 1996 Act, *i.e.*, by February 8, 1997.

¹⁰⁶ The term "incumbent LEC" is defined, for purposes of Section 259, in Section 251(h), which states:

- (1) DEFINITION -For purposes of this section, the term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that -
 - (A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and
 - (B) (i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or
 - (ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i).

47 U.S.C. § 251(h).

obtained designation as an eligible carrier under Section 214(e).¹⁰⁷ Some potential definitions of a BOC's "area of interest," as that phrase is used in Section 273(e)(3), might subject a BOC and a Section 259-defined qualifying carrier to obligations under both Section 259 and Section 273(e)(3). We believe, however, that the obligations imposed by Section 273(e)(3) are separate from, and consistent with, those imposed by Section 259. Because Section 273(e)(3) requires joint network planning and design among BOCs and LECs operating in the same "area of interest," we believe that Section 273(e)(3) specifically contemplates joint network planning and design between a BOC and other LECs that may be the BOC's competitors, to the extent that such activities are consistent with the antitrust laws. In contrast, Section 259(b)(6) specifically provides that an incumbent LEC shall not be required to "engage in any [Section 259-derived] infrastructure sharing agreement for any services or access which are to be provided or offered to consumers by the qualifying carrier in such [LEC's] telephone exchange area."¹⁰⁸ In other words, apparently unlike Section 273(e)(3), Section 259 appears to apply only in instances where the qualifying carrier does not seek to offer certain services within the incumbent LEC's exchange area.¹⁰⁹ Accordingly, we believe that the specific obligations imposed by Section 259 do not conflict with Section 273(e)(3)'s mandates. We seek comment on this interpretation, including comment on other possible implications for carriers that may be subject to obligations under both Section 259, as interpreted by the Commission in CC Docket No. 96-237, and Section 273(e)(3).

72. Section 256, entitled "Coordination for Interconnectivity," requires, *inter alia*, that the Commission establish procedures for Commission oversight of coordinated network planning by telecommunications carriers and other providers of telecommunications services for the effective and efficient interconnection of telecommunications networks used to provide telecommunications service.¹¹⁰ We seek comment on the relationship between the BOCs' obligations under Section 273(e)(3) and the obligations Section 256(b)(1) imposes on all telecommunications carriers and other providers of telecommunications service. The newly

¹⁰⁷ 47 U.S.C. § 259. Section 259(d) defines a "qualifying carrier" as a telecommunications carrier that:

- (1) lacks economies of scale or scope, as determined in accordance with regulations prescribed by the Commission pursuant to this section; and
- (2) offers telephone exchange service, exchange access, and any other service that is included in universal service, to all consumers without preference throughout the service area for which such carrier has been designated as an eligible telecommunications carrier under Section 214(e).

47 U.S.C. § 259(d).

¹⁰⁸ 47 U.S.C. § 259(b)(6).

¹⁰⁹ *Infrastructure Sharing NPRM*, at ¶ 11.

¹¹⁰ 47 U.S.C. § 256(b)(1).

revised charter for the Commission's Federal Advisory Committee, the Network Reliability and Interoperability Council ("NRIC"), asks the NRIC to provide recommendations on the implementation of Section 256, including specifically how the Commission can most efficiently conduct effective oversight of coordinated telecommunications network planning and design.¹¹¹ We seek comment on the relationship between the NRIC's responsibility under Section 256 and the BOCs' obligations under Section 273(e)(3).

73. Section 273(e)(4) states that "[n]either a Bell operating company engaged in manufacturing nor a manufacturing affiliate of such a company shall restrict sales to any local exchange carrier of telecommunications equipment, including software integral to the operation of such equipment and related upgrades." We tentatively conclude that this language is unambiguous and we seek comment on the validity of this conclusion. We also seek comment with respect to establishing criteria for determining when sales have been restricted. Commenters may address, for example, whether restriction should be measured by the volume of sales per unit of time, or by the type of equipment sold, or both, or by some other measure. We also request that commenters address: (1) whether the Commission should require or perform periodic audits of BOC sales; (2) whether the Commission should collect information on procurement practices to enable us to detect anomalous behavior that might trigger an audit or investigation; and (3) whether the Commission should adopt other additional rules to implement this provision of the 1996 Act.

74. Section 273(e)(5) states that "[a] Bell operating company and any entity it owns or otherwise controls shall protect the proprietary information submitted for procurement decisions from release not specifically authorized by the owner of such information." We tentatively conclude that this language is unambiguous and self-executing because it corresponds to the customary use of common legal instruments such as non-disclosure agreements and license agreements. We seek comment on this tentative conclusion.

F. Section 273(f): Administration and Enforcement Authority

75. Section 273(f) provides that for "*the purposes of administering and enforcing the provisions of this section and the regulations prescribed thereunder, the Commission shall have the same authority, power, and functions with respect to any Bell operating company or any affiliate thereof as the Commission has in administering and enforcing the provisions of this title with respect to any common carrier subject to this Act.*"¹¹² We tentatively conclude that the Commission has broad authority to regulate all matters contemplated by Section 273

¹¹¹ FCC Amends Charter of Network Reliability and Interoperability Council, 61 Fed. Reg. 26516 (1996). We will place a copy of the text of the Network Reliability and Interoperability Council Charter in the docket file of this proceeding.

¹¹² 47 U.S.C. § 273(f) (emphasis added).

under Sections 1,¹¹³ 2(a),¹¹⁴ 3,¹¹⁵ and 4(i)¹¹⁶ of the Communications Act and seek comment on this tentative conclusion.

76. Section 273 addresses standards development, joint network planning, research and development, and collaboration with respect to entities that are not common carriers. While Sections 206 to 209 of the Communications Act provide statutory mechanisms for addressing complaints regarding common carrier matters,¹¹⁷ additional regulations may be needed to address violations of Section 273 by entities that are not common carriers. We seek comment on, and the proposed text of, any additional rules that may be necessary, or desirable, to enforce Section 273, in addition to those that presently exist to implement Sections 206 to 209, and 501 to 503 of the Communications Act, as amended.

77. Although Section 273(d)(5) requires the Commission to prescribe a default process for use in resolving standards-setting disputes,¹¹⁸ it does not contain any specific directives to govern the resolution of complaints filed under other provisions of Section 273. Particularly with respect to Sections 273(d)(2) through 273(d)(4), however, we recognize that accurate, efficient, and rapid resolution of alleged violations of Section 273 will be essential to the proper operation of this statutory section. We may find it beneficial to both the Commission and industry to amend our rules in order to increase the speed and efficiency of our complaint resolution processes and to meet better the demands of this and other sections of the 1996 Act. We are addressing potential means of accomplishing this goal in a separate proceeding¹¹⁹ and we encourage commenters in that proceeding to address specific enforcement concerns relating to section 273 in particular and other sections of the 1996 Act in general.

¹¹³ 47 U.S.C. § 151.

¹¹⁴ 47 U.S.C. § 152(a), which states that the Communications Act "applies to all interstate and foreign communications by wire or radio"

¹¹⁵ 47 U.S.C. §§ 153(51) and (33), defines communications by wire and radio in a manner that incorporates all technologies and methods of operating.

¹¹⁶ 47 U.S.C. § 154(i) permits the Commission to perform "any and all acts . . . which may be necessary in the execution of its functions."

¹¹⁷ 47 U.S.C. §§ 206-209.

¹¹⁸ 47 U.S.C. § 273(d)(5).

¹¹⁹ *Implementation of the Telecommunications Act of 1996, Amendment of Rules to Be Followed When Formal Complaints Are Filed Against Common Carriers*, CC Docket No. 96-238, Notice of Proposed Rulemaking, FCC 96-460, (rel. Nov. 27, 1996).

G. Section 273(g): Additional Rules and Regulations

78. Section 273(g) states that "[t]he Commission may prescribe such additional rules and regulations as the Commission determines are necessary to carry out the provisions of [Section 273], and otherwise to prevent discrimination and cross-subsidization in a Bell operating company's dealings with its affiliate and with third parties."¹²⁰ We seek comment on what, if any, additional rules should be adopted under this provision "to prevent discrimination and cross-subsidization in a Bell operating company's dealings with its affiliate and with third parties," and we request that commenters proposing such rules do so in their initial comments, so that other parties may respond to the proposals during the reply comment period. We seek additional specific comment on whether the sale of Bellcore, as announced, creates a need for additional rules under this section.

III. CONCLUSION

79. Section 273 establishes the conditions under which Bell Operating Companies may manufacture and provide telecommunications equipment, and manufacture customer premises equipment. It also sets forth safeguards against anticompetitive behavior in manufacturing markets by entities other than BOCs. With this NPRM, we seek to ensure that the safeguards that Congress enacted are effectively and efficiently administered. Our further objectives in this proceeding are to develop regulations that will foster technological innovation and competition in both the customer premises equipment and telecommunication equipment markets. We encourage commenters to propose innovative and administratively simple rules that will enable us to meet these objectives, and request that interested parties propose the text of any rules that they may deem appropriate to implement Section 273. We further request that, in general, those commenters proposing such rules do so in their initial comments so that other parties may reply to them in their reply comments.

IV. PROCEDURAL ISSUES

A. Ex Parte Presentations

80. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

¹²⁰ 47 U.S.C. § 273(g) (emphasis supplied).

B. Regulatory Flexibility Act

81. We certify that the Regulatory Flexibility Act does apply to this rulemaking proceeding because there may be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act.¹²¹ A complete analysis is contained in Appendix A. The Secretary shall send a copy of this Notice of Proposed Rulemaking including this certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act.¹²²

C. Initial Paperwork Reduction Act of 1995 Analysis

82. This NPRM contains either a proposed or modified information collection. As part of our continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections identified in this NPRM, as required by the Paperwork Reduction Act of 1995.¹²³ Public and agency comments are due at the same time as other comments on this NPRM; OMB comments are due 60 days from date of publication of this NPRM in the *Federal Register*. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

D. Notice and Comment Provision

83. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before 30 days after publication of this Notice in the Federal Register, and reply comments on or before 30 days after the comment due date. To file formally in this proceeding, interested parties must file an original and six copies of all comments, reply comments, and supporting comments, with the reference number "CC Docket 96-254" on each

¹²¹ 5 U.S.C. § 601(3).

¹²² 5 U.S.C. § 603(a) (as amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847, 866 (1996)).

¹²³ Pub. L. No. 104-13, *codified at* 44 U.S.C. §§ 3501-3520.

document. Those parties wishing each Commissioner to receive a personal copy of their comments must file an original plus eleven copies. Parties must send comments and reply comments to the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W. Room 222, Washington, D.C. 20554. Parties must also provide four copies to Secretary, Network Services Division, Common Carrier Bureau, 2000 M Street, N.W., Room 235, Washington, D.C. 20554. Parties must also provide one copy of any documents filed in this docket to the Commission's copy contractor, International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

84. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Copies of comments and reply comments will also be available through the Commission's copy contractor: International Transcription Service, Inc. (ITS, Inc.), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037 (202-857-3800).

85. In order to facilitate review of comments and reply comments, both by parties and Commission staff, we require that comments not exceed sixty (60) pages, including all appendices and attachments (except the text of proposed rules), and that reply comments not exceed thirty (30) pages. We can foresee no circumstances in which these page limits would be waived. Comments and reply comments must also include a short, concise summary of each substantive argument raised in the pleading, regardless of length. The summary may be paginated separately from the rest of the pleading and will not count toward the page limitations established above.¹²⁴

86. Written comments by the public on the proposed and/or modified information collections are due thirty days after publication of this Notice in the *Federal Register* and must have a separate and distinct heading designating the comments as responses to the regulatory flexibility analysis. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after date of publication in the *Federal Register*. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to dconway@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to fain_t@al.eop.gov.


¹²⁴ See 47 C.F.R. § 1.49.

E. Ordering Clauses

87. Accordingly, IT IS ORDERED that pursuant to Sections 1, 3, 4, 7, 201-209, 218, 251, 273 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 157, 201-209, 218, 251, 273, and 403 that this NOTICE OF PROPOSED RULEMAKING is hereby ADOPTED.

88. IT IS FURTHER ORDERED that the Secretary SHALL SEND a copy of this NOTICE OF PROPOSED RULEMAKING, including the regulatory flexibility certification to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 603(a).

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

APPENDIX A**Initial Regulatory Flexibility Analysis (IRFA)**

1. Pursuant to Section 603 of the Regulatory Flexibility Act (RFA), the Commission has prepared the following Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the policies and rules proposed in the Notice of Proposed Rulemaking (NPRM). Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the remainder of the NPRM, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of the NPRM, including the IRFA, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act.

2. Reason for Action: The Commission, in compliance with Section 273 of the Communications Act of 1934 ("Communications Act"), as amended by the Telecommunications Act of 1996 ("1996 Act"), proposes rules and procedures intended to ensure the prompt adoption of regulations to administer and enforce Section 273 provisions with minimum regulatory and administrative burden on telecommunications carriers. The rules proposed in the NPRM are necessary to implement Section 273, in which Congress imposes requirements affecting Bell Operation Companies (BOCs), Bellcore, and entities that develop standards, develop generic requirements and conduct certification activity. This NPRM proposes rules and seeks comment to implement Section 273 in a manner that is consistent with Congress's intent.

3. Objectives and Legal Basis for Proposed Rules: The Commission's objective in issuing the NPRM is to propose and seek comment on rules enabling the Commission to administer and enforce Section 273 effectively and efficiently, and in a manner that is consistent with the intent of Congress. The proposed action is authorized under Sections 1, 3, 4, 7, 201-209, 218, 251, 273, and 403 of the Communications Act, as amended, 47 U.S.C. Sections 151, 153, 154, 157, 201-209, 218, 251, 273, and 403.

4. Description and Estimated Number of Small Entities Affected: Section 273 authorizes the Commission to impose standards on the BOCs, Bellcore, and entities that develop standards, develop generic requirements and conduct certification activity. Neither BOCs nor Bellcore qualify as small business entities; for they are dominant in their field of operation. See RFA, Section 601(3). Conversely, the size of the entities that develop standards, develop generic requirements, and conduct certification activity is unknown and may include small business entities. Accordingly, we certify that the Regulatory Flexibility Act of 1980, as amended, does not apply to this rulemaking proceeding insofar as it pertains to BOCs or Bellcore since our rules are not likely to have a significant economic impact on a

substantial number of small entities, as defined by section 601(3) of the Regulatory Flexibility Act.

5. Our rules, however, may have a significant economic impact on a substantial number of small businesses insofar as they apply to entities that develop standards, develop generic requirements and conduct certification activity. We request comment on the number of possible small business entities that would fall under entities that develop standards, develop generic requirements, and conduct certification activity in addition to comment as to how to develop requirements that would effectively assist and not unduly burden qualifying small business entities.

6. Reporting, Recordkeeping and Other Compliance Requirements: The NPRM requests comment on reasonable reporting requirements for BOCs as to network planning, design, and interconnection arrangements. Similarly, this IRFA seeks comment on measures that could be taken by the Commission to limit any burdensome requirements upon small business entities. It seeks comment on reasonable notice requirements for BOCs as to communicating planned deployment of telecommunications equipment to their interconnecting carriers.

7. The Commission's action in this proceeding is in direct response to Congress's passage of the 1996, in particular Section 273. This NPRM only sets forth tentative conclusions as to Congress's intentions within Section 273. For an exhaustive recitation of the Commission's tentative conclusions, see this NPRM at paragraphs 8-11, 18, 20-21, 26, 29, 37-38, 40, 43, 48, 50, 52-55, 59-62, 68, 71, 73-75.

8. This NPRM also seeks comment on rules proposed to administer and enforce manufacturing safeguards potentially impacting entities that develop standards, develop generic requirements and conduct certification activities. Rules adopted in this proceeding may require reporting, recordkeeping, and may impose other procedural requirements. There are no other reporting requirements contemplated by the NPRM.

9. Federal Rules which Overlap, Duplicate or Conflict with these Rules: The Commission seeks comment as to what overlap, if any, exists or may exist among the requirements that this Commission may adopt to implement Section 273 and the Commission's existing rules. For example, the Commission has identified two sources of potential overlap in 47 C.F.R. § 64.702 and 47 C.F.R. § 68.110, and seeks comment as to how the procedures required in these existing rules may be adapted to minimize additional regulatory burdens.

10. With respect to rules that may potentially affect BOCs, Bellcore, and entities that develop standards, develop generic requirements, or conduct certification activities, the Commission tentatively concludes that no overlap, duplication, or conflict with existing rules exists. The Commission seeks comment on this conclusion.

11. Significant Alternatives to the Proposed Rules which Accomplish the Stated Objectives of Applicable Statutes and which Minimize any Significant Economic Impact of the Proposed Rules on Small Entities: As mentioned in paragraphs four and five of this IRFA, the Commission believes that our rules may have a significant economic impact on a substantial number of small businesses insofar as they apply to entities that develop standards, develop generic requirements and conduct certification activity. We request comment from the industry in regards to significant alternatives to the proposed rules which accomplish the stated objective of applicable statutes and which minimize any significant economic impact of the proposed rules on small entities.

12. We advance that our tentative conclusions were reached with the interests and concerns of small businesses in mind. Although tentatively there will be no differing compliance or reporting requirements or timetables that take into account the resources available to small entities, the Commission finds this to be unnecessary. The Commission seeks comment on this tentative conclusion.

13. Additionally, the Commission tentatively concludes that the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities will not be necessary. The Commission seeks comment on this tentative conclusion. Lastly, neither the use of performance rather than design standards by the Commission nor an exemption from coverage of the rule, or any part thereof, for such small entities is believed to be required as a result of actions taken by the Commission in the impending Report and Order. The Commission seeks comment on this finding.